NO. 724

IN THE

Supreme Court of the United States

October Term, 1966

FRANK A. DUSCH, ET AL.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY AND HOWARD W. MARTIN,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Frank A. Dusch, et al.,* appeal from a judgment entered May 30, 1966, by the United States Court of Appeals for the Fourth Circuit declaring the statute apportioning the members of the city council unconstitutional as repugnant to the Equal Protection Clause of the Fourteenth Amendment. Appellants submit this

* Appellants consist of the following officials of the City of Virginia Beach, Virginia: eleven members of the city council, three members of the electoral board, treasurer, commissioner of revenue and two members of the state legislature.

Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 361 F. 2d 495 (4th Cir. 1966) and is printed in the Appendix as App. 1 to 7. The judgment of that court appears as App. 8. The memorandum opinion of the United States District Court for the Eastern District of Virginia, which was reversed by the United States Court of Appeals, appears as App. 9 to 19.

Included in the Appendix are opinions of the United States District Court in earlier phases of the case which are considered relevant to this appeal. They appear as App. 20 to 24 and 25 to 28.

JURISDICTION

This suit was brought to have declared unconstitutional a state statute relating to the apportionment of the Virginia Beach city council and to enjoin the holding of councilmanic elections pursuant thereto. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. §§ 1983, 1988.

The opinion of the Court of Appeals was filed on May 30, 1966, and its judgment reversing and remanding to the District Court was entered on the same date. A notice of appeal was filed in the Court of Appeals on August 26, 1966. Jurisdiction of this appeal is conferred on the United States Supreme Court by 28 U.S.C. § 1254(2). The following representative cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Reynolds*

v. *Sims*, 377 U.S. 533 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964).

QUESTIONS PRESENTED

(1) Whether the doctrine of "one person, one vote," as enunciated in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent decisions for apportionment of members of state legislatures, also applies to the apportionment of members of a city council among the several boroughs or wards of a city.

(2) If such doctrine does apply, whether the "Seven-Four Plan" prescribed by the Charter of the City of Virginia Beach, Virginia (Ch. 147, Acts of Assembly of 1962; as amended by Ch. 39, Acts of Assembly of 1966) for the election of councilmen results in such invidious discrimination as to violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The statutes involved are Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach, Virginia, establishing the Seven-Four Plan of election of city councilmen, being a portion of Chapter 39 of the Acts of Assembly of 1966:

> "§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the city of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the re-

maining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the the city at large.

"§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966 and on the second Tuesday in June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning on the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms."

STATEMENT OF THE CASE

The present City of Virginia Beach came into being on January 1, 1963, when Virginia Beach, a resort city having an area of 2.4 square miles and a 1960 population of 8,091, consolidated with adjoining Princess Anne County, having an area of almost 300 square miles and a 1960 population of 77,121. In terms of area it is one of the largest cities in the United States.

Two things characterize Virginia Beach today—its explosive growth and its heterogeneous physical and economic composition. Total population increased from 85,218 at the

1960 census to an estimated 118,139 in 1964, an overall increase of 40% in four years.*

The city is divided into seven boroughs, of which six correspond with the magisterial districts of the former county and one with the former city. These boroughs, their respective sizes and populations are as follows:

Borough	*Area-Sq. Mi.*	*Population 1960*	*Population 1964(est.)*
Virginia Beach	2.4	8,091	10,473
Bayside	28	29,048	36,027
Blackwater	34	733	862
Kempsville	36.6	13,900	22,254
Lynnhaven	47	23,731	37,760
Princess Anne	58.6	7,211	7,957
Pungo	94.4	2,504	2,806

The three boroughs to the north (Bayside, Kempsville and Lynnhaven) are primarily urban. Their large residential areas house persons employed in the adjoining City of Norfolk and at the numerous nearby military installations. These boroughs also contain most of the city's commercial and industrial areas as well as its potential for future development of this character. The three boroughs to the south (Blackwater, Princess Anne and Pungo) are primarily rural and are destined to remain that way. Agriculture is the dominant industry but substantial areas are devoted to recreational uses. The borough of Virginia Beach is centered almost entirely around its famous ocean beach and the tourist industry.

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* According to figures just released, Virginia Beach now has an estimated population of 131,860. *Estimate of the Population of the Counties and Cities of Virginia as of July 1, 1966*, Bureau of Population and Economic Research, University of Virginia, Charlottesville, Virginia, October 19, 1966.

The consolidation was effected by vote of the people in both the old city and county pursuant to Article 4, Chapter 26, Title 15.1, Code of Virginia of 1950, as amended, and by the granting of a charter by the General Assembly of Virginia. A borough form of government was selected. This permitted the levy of higher taxes in those areas desiring more governmental services than were desired in the city as a whole. A cornerstone of the plan was the election of a councilman from each borough to represent the needs of its citizens. The initial council had eleven members. The borough of Virginia Beach continued to elect five councilmen from the borough at large and the six boroughs comprising the former magisterial districts of the county continued to elect one representative each. This was an interim plan designed to rally the support of voters in a new city half rural and half urban and required the initiation of a new system of representation after 1968.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, plaintiffs below and appellees here (herein referred to as "Voters"), filed a complaint in the United States District Court for the Eastern District of Virginia against Frank A. Dusch and others, being city councilmen and other city officials (herein referred to as "Officials"), seeking the convening of a three judge court to declare unconstitutional that plan for the election of councilmen and to grant various injunctive relief. Following a decision by the three judge court ordering its dissolution (App. 25 to 28), the district judge, to whom the case was referred, held on December 7, 1965, that the existing apportionment was unconstitutional as violating the doctrine of "one person, one vote" (App. 20 to 24). That court stayed further proceedings to allow the city an opportunity to seek a charter amendment at the 1966 session of the state legislature.

The General Assembly of Virginia amended the Virginia Beach city charter on February 23, 1966, to provide for the election of councilmen under the Seven-Four Plan (Ch. 39, Acts of Assembly of 1966). According to that plan, eligible voters throughout the city vote for all eleven councilmen. Seven are elected by the voters of the entire city, one being required to reside in each of the seven boroughs, and four are elected by the voters of the entire city without regard to residence.

This plan was selected to guarantee that persons having a knowledge of rural problems would sit on the council. Three of seven boroughs are predominantly rural and agriculture is still the city's largest industry. While it was felt that traditional at large elections would come in time, the Seven-Four Plan was considered to be the best form of government for a unique and heterogeneous city during a period of continued growth and transition.

Pursuant to leave granted them by the December 7, 1965, order of the District Court, Voters filed a supplemental complaint challenging the validity of the Seven-Four Plan and seeking an injunction against an election to be held thereunder. On April 8, 1966, the District Court held that the Seven-Four Plan did not violate the doctrine of "one person, one vote" and dismissed the original and supplemental complaints (App. 9 to 19).

On appeal to the United States Court of Appeals for the Fourth Circuit, that court on May 30, 1966, reversed. While refusing to enjoin an election scheduled for June 14 under the Seven-Four Plan, the Court of Appeals remanded the case to the District Court with instructions to set aside the current apportionment and order an election at large or realign the boroughs so as to equalize substantially their population if no reapportionment is made at the next ses-

sion of the General Assembly. It is from this opinion and accompanying judgment of the Court of Appeals that this appeal has been taken.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important questions in an area in which this Court has never spoken.

This Court has repeatedly made it clear that the Equal Protection Clause of the Fourteenth Amendment requires the apportionment of Congressional and state legislative districts in accordance with the doctrine of "one person, one vote." Yet, it has never decided whether this doctrine applies to the myriad units of local government.

If this Court should extend the "one person, one vote" principle to local government, it must then determine whether the same standards promulgated for apportioning state legislatures must be observed in the vastly different area of local legislative bodies.

"One Person, One Vote" and Local Government

From the decided cases the courts are not clear whether the doctrine of "one person, one vote" as enunciated in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and other state legislative cases also applies to local levels of government such as counties, cities, towns and various local boards and commissions. For example, in *Detroit Edison Co.* v. *East China Township School Dist. No. 3*, 247 F. Supp. 296, 300 (E.D. Mich. 1965), the court said:

> "Much uncertainty surrounds the effect of the reapportionment decisions on local government. A threshold question is whether the equal protection clause applies to *any* municipal problems, even reapportionment of representative legislative bodies.

> "The Supreme Court has not specifically extended the application of the equal protection clause beyond the composition of state legislatures and justiciability may well be limited to the state. Some lower courts have held that the equal protection clause does not extend to local units of government, . . . others that it does apply, . . . and still others have assumed it extends without fully discussing this issue, . . ."

In *Johnson* v. *Genessee County, Michigan*, 232 F. Supp. 567, 572 (E.D. Mich. 1964), a federal district court held that neither the federal constitutional provision guaranteeing every state a republican form of government nor the Fourteenth Amendment requires districting of local leigslative bodies on the basis of population:

> "Under the prevailing view of the United States Supreme Court, as we have pointed out above, the composition of local units of government is held to be a state matter. Under the rule of stare decisis, this Court is not free to consider the subject of the apportionment of representation on local legislative bodies. It may well be that the time will come when the application of the Fourteenth Amendment will be extended that far. The more likely development is that the June 15, 1964, rulings of the Supreme Court in cases dealing with the state legislatures of Alabama, New York, Maryland, Delaware, Virginia, and Colorado will result in legislatures in our states which will be proportionately representative of people, and therefore, likely to themselves establish in local legislative bodies a vastly different balance between people and governmental power."

More recently, the United States District Court for the Middle District of Alabama has taken the position that the doctrine does not apply to local governmental units. *Moody*

v. *Flowers*, 256 F. Supp. 195 (M.D. Ala. 1966), *appeal docketed*, 35 U.S.L. Week 3130 (Oct. 3, 1966) (No. 624). In the words of that court, "The numerical imbalance demonstrated by simple statistics falls far short of proving invidious discrimination." The court went on to state that so long as the people of a state are afforded equal protection through equality of representation in the state legislature, the courts should not interfere with representation on the lesser levels of government which have been created by and derive their powers from that legislature.

In *Sailors* v. *Board of Education*, 254 F. Supp. 17, 29 (W.D. Mich. 1966), *appeal docketed*, 35 U.S.L. Week 3072 (Aug. 10, 1966) (No. 430), which held "one man, one vote" not applicable to the apportionment of school districts in Michigan, the court said:

> "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. We are satisfied that the Supreme Court of the United States has not yet reached that point. We are satisfied that we should not anticipate that the Supreme Court will reach that point."

The distinction made in these cases between applicability of "one man, one vote" at the local as opposed to the state level of government draws strong support from Mr. Chief Justice Warren speaking in *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964):

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been tradi-

> tionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.' . . ."

There are cogent reasons for this Court to hold now that the doctrine does not extend beyond the apportionment of state legislatures to local government. Municipalities have no inherent sovereignty except as provided in state constitutions. They are creatures of the state and, as such, are subject to complete control by the state. Its legislature, in the exercise of its authority over units of local government, could provide, without violating the Constitution, that local officials be appointed by the state instead of being elected by the voters. The Federal judiciary should not become involved in the apportionment of the innumerable county, city and town governing bodies and the local boards and agencies which exercise legislative or quasi-legislative functions.

In *Griffing* v. *Bianchi*, 382 U.S. 15 (1965), this Court refused to review the decision of a three judge court which held that the Equal Protection Clause applied to the apportionment of the Suffolk County, New York Board of Supervisors. This Court dismissed the appeal "for want of jurisdiction." One court has construed the dismissal as a limitation by this Court of the Equal Protection Clause. *Detroit Edison Co.* v. *East China Township School Dist. No. 3, supra*, 247 F. Supp. 296, 300-01 (E.D. Mich. 1965).

The question of the applicability of the doctrine of "one person, one vote" at local levels of government is squarely presented on this appeal. The same question is also being presented in *Moody* v. *Flowers*, 256 F. Supp. 195 (M.D. Ala. 1966), *appeal docketed*, 35 U.S.L. Week 3130 (Oct. 3, 1966) (No. 624) and *Sailors* v. *Board of Education*, 254 F. Supp. 17 (W.D. Mich. 1966), *appeal docketed*, 35 U.S.L. Week 3072 (Aug. 10, 1966) (No. 430). Local governing officials throughout the country are waiting for clarification of the matter.

The Seven-Four Plan Accords with "One Person, One Vote"

The Seven-Four Plan is a true hybrid and its uniqueness makes this a case of first impression. This is not the typical case in which areas having unequal populations have the same amount of representation, thus giving one vote in the smaller area greater value than one vote in the larger area. Under the Seven-Four Plan, there is no such dilution of votes. Every vote in Virginia Beach counts equally since all candidates are elected by a city-wide vote.

In ruling that the guarantee of resident councilmen to the three least populous boroughs fails to comply with the Equal Protection Clause, the Court of Appeals ignored the very heart of the Seven-Four Plan. Although seven of the eleven councilmen must reside in the boroughs of their residence, they are representatives of the entire city, not just of their respective boroughs, because they are elected by and are responsible to the voters of the entire city.

The point is illustrated in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), where this Court upheld a residence requirement for the election of state senators in Georgia in a multi-district county. There, as here, all elected representatives within the county were subject to a vote of the entire

county. As stated by Mr. Justice Brennan, they were the elected representatives of the entire county, not merely the district of their residence:

> "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. . . ." (379 U.S. at 438)

Admittedly, the reason for the Seven-Four Plan is to insure that the city council will always include *some* persons familiar with the rural point of view. This is important because the agriculture of the three sparsely populated boroughs constitutes the city's largest industry and the problems of rural areas differ from those of urban centers. Yet, so long as the city council is subject at all times to the control of the majority, any favoritism which may be charged is unconvincing.

The fundamental fairness of the Seven-Four Plan is illustrated by the following excerpts from the District Court's opinion:

> "As the Supreme Court indicated, there may be instances or circumstances which will not comport with the dictates of the Equal Protection Clause where, designedly or otherwise, the plan operates to minimize or cancel out the voting strength of racial or political elements of the voting population. The record in the

instant case makes no such suggestion. The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . ." (App. 15-16).

* * *

". . . the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. . . ." (App. 18)

To strike down the Seven-Four Plan as being invidiously discriminatory is tantamount to saying that there are only two permissible methods of electing city councilmen—one by the familiar at large election without regard to residence and the other by and from districts or wards of substantially equal population. Use of either method would have bizarre results at Virginia Beach for the very reasons pointed out in an annotation entitled "Inequalities in Population of

Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. Ed. 2d 1282 (1965).

While a system of traditional at large elections without regard to residence admittedly passes all constitutional tests, it would not be acceptable at Virginia Beach. In the language of the annotation, such a system promotes the denial of representation of minority interests. The two boroughs with a majority of the population could easily elect all eleven councilmen. This would not be so important in the average city because all of its probems are apt to be essentially urban in nature. But with its 300 square miles consisting of relatively small urban centers, extensive suburban development and vast agricultural and undeveloped areas, Virginia Beach is unique. This rapidly growing and changing new city cannot afford to take the chance that none of its councilmen will be familiar with its major industry and the related problems of the rural sections which comprise more than half its area.

District or ward elections solve these problems but create others. How to district the city is complicated by the population explosion. When two boroughs show a 60% population growth in just four years, it is obvious that ward elections cannot keep up with the demographic changes being experienced here.

The Seven-Four Plan was designed to meet the needs of a unique situation. It combines the best elements of at large and ward elections in a way that insures a free and effective vote for all while permitting an intelligent expression on the council of views relating to every phase of the city's varied life.

Voters have seized on the egalitarian appeal of the slogan "one person, one vote" and argue that it represents an unyielding mandate of this Court requiring an absolute

adherence to strict population standards. The Court of Appeals for the Fourth Circuit seems to agree. But this position misses in part the teaching of *Reynolds*:

> "Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." (377 U.S. at 560-561)

In *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123, 126 (4th Cir. 1965), it was recognized that departures from the standard will be permitted where based on specific proof of permissible considerations, but not on vague generalities. In finding the South Carolina senate reapportionment plan invalid, a three judge court stated in *O'Shields* v. *McNair*, 252 F. Supp. 708, 715 (D.S.C. 1966):

> "It may be that after extended evidentiary hearings, the state might be able to justify the apportionment or the negative residence clause, or both. We only hold that justification of either is not now clearly apparent on this record."

We deny that the Seven-Four Plan departs from the basic standard of equality among voters required by *Reynolds* and related state legislative apportionment cases. However, if we concede such departure for the sake of argument, the reasons therefore, as described above, are entirely proper.

This Court recognizes that the type of government may be considered in evaluating the constitutionality of deviations from a strict population standard. It has expressly declared in *Reynolds* that "distinctions may well be made between congressional and state legislative representation" and, accordingly, "somewhat more flexibility may therefore be constitutionally permissible with respect to legislative apportionment." (377 U.S. at 578).

More flexibility should be allowed local governments than state legislatures. There is such a variety of local units exercising varying powers. And the variety of local conditions is even greater. Surely, this Court did not intend to place local governments in a straight jacket, as the Court of Appeals has done here, by an automatic application of the same standards imposed on the states by *Reynolds* and related state apportionment decisions.

CONCLUSION

The questions presented by this appeal are substantial and are of far-reaching public importance to many levels of local government. This Court should note probable jurisdiction and hear full argument of this appeal, either alone or in conjunction with the other pending cases presenting similar questions.

Respectfully submitted,

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Dated October 25, 1966

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,592.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin,

Appellants,

versus

Frank A. Dusch, Member, City Council, City of Virginia Beach, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk
Walter E. Hoffman, Chief District Judge.

(Argued May 4, 1966. Decided May 30, 1966.)

Before BOREMAN, BRYAN and BELL, *Circuit Judges.*

Albert V. Bryan, Circuit Judge:

Apportionment of councilmen of the City of Virginia Beach, Virginia, among its seven boroughs presents this controversy. The original allocation in the city charter was annulled by the District Court in an earlier proceeding,[1] as denying the electorate one-person-one-vote equality.[2]

[1] *Davis et al.* v. *Dusch et al.*, (E.D. Va.), unreported opinions of 3-judge court dated Nov. 9, 1965 and of single judge dated December 7, 1965.

[2] *Davis* v. *Mann*, 377 U.S. 678 (1964); *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123 (4 Cir. 1965).

The charter was then amended by the General Assembly of Virginia in the January-March 1966 session to provide a new plan.[3] To a renewed attack on the same ground, the District Court held the present pattern impregnable. The holding is now appealed and this court reverses.

The contested allotment of members of the council, the governing body of the city, is commonly known as the Seven-Four plan. It provides for 11 councilmen, *all to be selected by the qualified voters throughout the entire city.* However, 7 members are apportioned among 7 boroughs, one to each borough who must be a resident of that borough. The remaining 4 members are assigned to the city at large and may reside anywhere within its corporate limits.

The boroughs, their respective sizes and populations are as follows:

Area in Square Miles	*Borough*	*1960 Population*
34	Blackwater	733
94.4	Pungo	2,504
58.6	Princess Anne	7,211
36.6	Kempsville	13,900
47	Lynnhaven	23,731
28	Bayside	29,048
2.4	Virginia Beach	8,091

The present city of Virginia Beach is the result of a consolidation on January 1, 1963 of the previous city of that name and the adjoining Princess Anne County. At that time the County was divided into 6 magisterial districts corresponding with, and having the same names as, the present boroughs, except that the borough of Princess Anne was formerly Seaboard District. Each district elected a

[3] Acts of General Assembly, 1966, ch. 39, p. 89, H.B. 101, approved February 23, 1966.

supervisor, and these 6 supervisors constituted the governing County Board of Supervisors. The old city of Virginia Beach had 5 councilmen. Thus the initial council membership was a combination of the 6 former County supervisors and the 5 former councilmen. However, as will have been noted, 5 councilmen of the old city are now disposed as follows: to the Virginia Beach borough 1 and to the new city at large 4.

The earlier city was, as is now the borough of Virginia Beach, an oceanside resort looking mainly to summer tourists for its economy. Princess Anne County was formerly half urban and half rural. The new city encompasses about 301.6 square miles, of which 79.6 is water. As found by the District Court, the boroughs are generally of the following character:

Blackwater is agricultural and is expected to continue so for many years.

Pungo is "essentially rural."

Princess Anne, formerly the county seat and now containing the administrative agencies and the State courts, is "still primarily agricultural in nature."

Kempsville is changing rapidly from rural to urban.

Lynnhaven is "a residential area with predominantly urban characteristics."

Bayside "has a considerable quantity of farm land" but as a suburb of the City of Norfolk many of its tracts have been developed for residential occupancy, and the borough has taken on an urban complexion.

Virginia Beach as a borough continues to be a seaside resort as it has always been.

To sustain the 7-4 formula, substantial reliance is put in the requirement in the 1966 Act that the city-wide voters elect all the councilmen. Thus it is stressed, the ballots of

voters in the smaller boroughs are not accorded greater weight than those cast in the larger boroughs: the small-borough voter's ballot is not more effective in electing a councilman than that of the large-borough elector. Correspondingly, the value of the larger-borough vote does not exceed the smaller-borough vote. The one-person-one-vote mandate is thus purportedly obeyed.

But full compliance with the 14th Amendment's Equal Protection Clause, we think, is still wanting. The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population. But that is not achieved in the 7-4 plan; the imbalance in representation in the council is obvious.

For example, Blackwater containing 733 people will have the same assured representation as the borough of Lynnhaven with 23,731 persons, or Bayside with 29,048, or Kempsville with 13,900. Similar contrasts are evident. This disparateness is not cured by the city-wide election provision. "It is the distribution of . . . [members] rather than the method of distributing . . . [them] that must satisfy the demands of the Equal Protection Clause." *Burns* v. *Richardson*, 34 U.S.L. Week 4365, 4366 fn. 4 (U.S. April 25, 1966).

Nor is this unequivalence of representation evened by the stipulation for 4 at-large councilmen to represent all of the boroughs. Their election would in no circumstances equalize the representation of the larger boroughs with that of the smaller. True, Lynnhaven and Bayside as the two largest boroughs population-wise could, if they cooperated, elect all of the 4 members. However, if each elected 2, and even if these were considered as in actuality councilmen of that

borough alone, giving it 3 members, the numerical representation per councilman would be far greater than that of Blackwater's member or Pungo's. Indeed, this would be so if all 4 at-large councilmen came from the largest borough, Bayside. Consequently, to repeat, the provision for 4 city-wide members does not remedy or in any way affect the disproportion of representation of the 7 borough members.

That equal representation is embraced in the Constitutional demand, epitomized as the rule of one-person-one-vote, is comprehensively expounded by Judge Sobeloff for this court in *Ellis* v. *Mayor and City Council of Baltimore,* 352 F2d 123 (4 Cir. 1965). Importantly, the case's subject is fairness in drawing councilmanic election wards and the Constitutional criteria therefor. The opinion demonstrates, passim, that the "true thrust" of *Reynolds* v. *Sims,* 377 US 533 (1964) and its kin—*WMCA, Inc.* v. *Lomenzo,* 377 US 633; *Maryland Committee* v. *Tawes,* 377 US 656; *Davis* v. *Mann,* 377 US 678; *Roman* v. *Sincock,* 377 US 695; and *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 US 713—is that " 'the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, *without regard to* race, sex, economic status, or *place of residence* within a State' ". (Accent added.) 352 F2d at 128. A city council was there analogized to a State legislature with the admonition that " 'seats in both houses . . . must be apportioned substantially on a population basis' ". Id. at 129. This distillation would only be watered down by further disquisition or by a rehearsal of the pat quotations the opinion takes from these precedents.

Fortson v. *Dorsey,* 379 US 433 (1965), cited to sustain the validity of the instant plan, finds acceptable only half of the present design. No fault was found there in the choice

of State senators in a multi-district county by a county-wide electorate, with the requirement that each senator be a resident of one of the districts. True, this scheme finds a parallel in the City of Virginia Beach's charter provision. But there the resemblance ends. In *Fortson* the Court significantly contracted its approval to the method of selection. It explicitly noted the absence of any substantial inequality among the districts. Had there been a vast disparity, such as Blackwater's 733 to Bayside's 29,048, it is not readily conceivable that the Court would have given its endorsement. In *O'Shields et al.* v. *McNair et al.* (D.S.C. 3-judge court, Feb. 28, 1966) Judge Haynsworth of this court, writing the opinion, termed the substantial population equality of the districts in *Fortson* as "crucial." We agree.

Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. Manifestly, the discussion in *Fortson* v. *Dorsey*, supra, 379 US 433, 438 seemingly discounting the fear of sectionalism in a district's legislator was conditioned upon "substantial equality of population" among the legislative districts there.

Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of

the council the representation of the peculiar interests of each borough. It was architectured to give voice to the agricultural or non-urban concerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment. *Reynolds* v. *Sims*, 377 US 533, 562 (1964); *Ellis* v. *Mayor and City Council of Baltimore, supra*, 352 F2d 123, 128.

Unless enjoined, the 1966 apportionment will control in the next general election of councilmen, now scheduled by general statute for June 14, 1966. It governed in a primary election on April 5, 1966 for the nomination of candidates in the general election. Protestants of the plan ask us to enjoin its further employment, and to order that the June election be held on the basis of a selection of all 11 councilmen from the city at large. However, we think such decrees would be an unneeded disturbance of municipal affairs at this time.

Therefore, the election will be allowed to proceed without delay. The successful candidates will be permitted to organize and serve as the council of the City of Virginia Beach until the next session, whether special or regular, of the General Assembly of Virginia. If no reapportionment is then made of the councilmen, the District Court shall set aside the current apportionment and order an election of the councilmen at large or realign the boroughs so as to equalize substantially their populations.

Counsel fees will not be awarded the protestants, but the City of Virginia Beach will be ordered to pay the costs in the trial court and on appeal. This case will be remanded to the District Court with directions to retain jurisdiction and to proceed in accordance with the views herein expressed.

Reversed and remanded.

JUDGMENT
(Filed May 30, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,592.

J. E. Clayton Davis, Rolland D. Winter,
Cornelius D. Scully and Howard W. Martin,
Appellants,

vs.

Frank A. Dusch, Member, City Council,
City of Virginia Beach, et al.,
Appellees.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of the Court filed herein.

Albert V. Bryan
United States Circuit Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

J. E. Clayton Davis, et als,

Plaintiffs,

v.

Frank A. Dusch, et als,

Defendants.

MEMORANDUM

By the terms of House Bill 101, the 1966 Session of the General Assembly of Virginia amended and reenacted certain provisions of the charter of the City of Virginia Beach in an effort to remedy the constitutional defects of the existing charter occasioned by reason of councilmanic malapportionment. House Bill 101 was signed by the Governor on February 23, 1966, as an emergency measure and is now in effect.

Prior to the effective date of the new legislation the structure of the City Council of the City of Virginia Beach was in accordance with district or borough representation. As so constituted it was an obvious attempt to afford actual personal representation to areas formerly comprising the County of Princess Anne and the old City of Virginia Beach before the effective date of the merger between the County and City which was on January 1, 1963. The charter incorporating the new City of Virginia Beach was enacted by

the General Assembly at its 1962 Session on the basis of agreements between the governing bodies of the consolidating area approved by popular referenda. This plan of representation was patently unconstitutional under the "one person, one vote" doctrine as enunciated by the recent decisions of the United States Supreme Court, as applied to councilmanic representation in *Ellis* v. *Mayor and City Council of Baltimore*, 4 Cir., 352 F. (2d) 123. It was the subject of prior memoranda filed on November 9, 1965 and December 7, 1965. Plaintiffs have now, in accordance with the suggestion of the Court, filed a supplemental complaint attacking the validity of the new statute which, for convenient reference, will be called the "Seven-Four Plan."

Princess Anne County, as it existed prior to the effective date of the merger on January 1, 1963, consisted of six districts with the 1960 population stated to be as follows:

District	*Population (1960)*
Blackwater	733
Pungo	2504
Seaboard	7211
Kempsville	13900
Lynnhaven	23731
Bayside	29048

The various members of the Board of Supervisors of Princess Anne County served as representatives of the individual district and were elected by vote of the qualified voters registered in that district. Upon the effective date of the merger, Seaboard District became Princess Anne Borough, but in other respects the geographical boundaries remained the same. Thus Princess Anne County had six members on its Board of Supervisors prior to the formation of the new city.

The old City of Virginia Beach had five councilmen representing 8091 persons according to the 1960 census. The area comprising the old City of Virginia Beach has been, and is now, largely dependent upon the summer tourist trade for its economic condition, although there are many fine homes throughout the area which are owned by permanent residents.

Former Princess Anne County was approximately 50% urban and 50% rural prior to the merger. The debts of the old county remained with the county under the terms of the merger; the debts of the old City of Virginia Beach remained with the people of that area. This has resulted in an unequal tax rate which continues in the boroughs of the new City of Virginia Beach.

The primary purpose of the merger was to forestall future annexation proceedings contemplated by the City of Norfolk bordering on the Kempsville and Bayside districts into which many citizens of Norfolk were gradually moving and, in addition, land for industrial development was becoming increasingly scarce in the City of Norfolk.

Irrespective of the wisdom of the merger, it has become an accomplished fact. Some pertinent facts of the new City of Virginia Beach are as follows:

1. It consists of 301.6 square miles, of which 222 square miles is made up of land and 79.6 square miles is water.

2. Bayside Borough is approximately 28 square miles in area. While at this time it still has a considerable quantity of farm land, it is essentially a suburb of the City of Norfolk devoted to residential purposes and much of the farm land has been sold for development purposes. It is, therefore, urban in character.

3. Lynnhaven Borough contains approximately 47 square miles. With the exception of some activity in the shellfish industry, Fort Story, Camp Pendleton, and the Oceana Air Base, it is likewise a residential area with predominantly urban characteristics.

4. Kempsville Borough is approximately 36.6 square miles. It adjoins the City of Norfolk and, while it was formerly largely rural, it is now undergoing a rapid expansion in the residential development field. Its state of transition is such that it will soon be largely urban.

5. Virginia Beach Borough contains only 2.4 square miles. Its urban character and great dependence upon the tourist trade has been previously noted.

6. Princess Anne Borough consists of 58.6 square miles. It is the former county seat of government and now houses the major administrative facilities, including the courts, serving the new City of Virginia Beach. Despite the fact that it is also in a gradual transition stage from rural to urban, it is still primarily agricultural in nature.

7. Pungo Borough contains 94.4 square miles of which 63 square miles is water. During World War II the government operated and maintained an airfield but this has since been abandoned. While there are beaches and bays with attractions for the hunters and fishermen, it remains essentially rural and, despite the growth in residential development, it is unlikely that any material change will be forthcoming during the next decade.

8. Blackwater Borough, containing 34 square miles, is agricultural and will probably remain rural for many years to come.

Faced with the problems of this heterogeneous city undergoing governmental transition and a population explosion reflected by the rapid estimated increase between 1960 and 1964[1] the city fathers approached the task of recommending a charter change to come within the constitutional ambit of the "one person, one vote" rule of law.

The new legislation denominated the "Seven-Four Plan" provides for the election of eleven councilmen with the eligible voters of the entire city voting for all candidates. Four persons are elected without regard to their place of residence within the city; the remaining seven, while elected by all voters, must reside in the particular borough and the person must state that he is running from the borough of his residence. For example, Lynnhaven, presently the largest borough in population, would be guaranteed the election of a member of the City Council residing in that borough. Lynnhaven could also have the four members elected at large without regard to residence requirement. The same is true as to Blackwater, the smallest borough. Moreover, the three smallest boroughs, Blackwater, Pungo and Princess Anne, would be assured of the election of one resident from each borough, even though the aggregate of the total population in these counties is considerably less than the population in either Kempsville, Lynnhaven or Bayside.

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[1]The percentage increase of population in the various boroughs, according to figures presented by plaintiffs' expert, and stated in the Court's memorandum filed December 9, 1965, reveal these approximate figures:

Borough	*Percentage Population Increase from 1/1/60 to 1/1/64*
Blackwater	17½%
Pungo	12%
Princess Anne	10%
Kempsville	60%
Lynnhaven	59%
Bayside	24%
Virginia Beach	21%

Plaintiffs urge that the "Seven-Four Plan" is in direct violation of the "one person, one vote" doctrine. They insist that there are only two permissible methods of electing councilmen in any city—one by the familiar at-large election without regard to the place of residence within the city—the other by dividing the city into boroughs or wards of approximately even population and providing for the election of representatives within each borough or ward by the voters of that area. While the question is not free from doubt, this Court does not believe that the constitutional limitations of the "one person, one vote" rule extend that far.

In *Fortson* v. *Dorsey*, 379 U.S. 433, the Supreme Court considered the Georgia Reapportionment Act which permitted the counties to be divided into senatorial districts, with a proviso that a candidate had to be a resident of the district from which he sought election, but all senators within the county were subjected to a county-wide vote rather than a district vote. In reversing the three-judge federal court holding that voters of one district must join with voters of other districts in selecting a group of senators and thereby nullifying their own choice of senator, Mr. Justice Brennan said:

> "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator."

Thus in Blackwater Borough, if Mr. Jones and Mr. Smith declare as candidates for the City Council of the City of Virginia Beach running from the borough of their residence, all qualified voters in Virginia Beach vote in this contest. If Jones is elected, he then represents the entire population of the City of Virginia Beach. He is the city's councilman and not merely Blackwater's councilman. And if he disregards the interests of people residing in other boroughs, his chances of survival at the next election would be indeed slight.[2]

It is true that under these circumstances, Blackwater, with the least population of any borough, is assured of a resident councilman. Plaintiffs point out that in *Fortson* v. *Dorsey*, supra, there was "substantial equality of population" among the 54 senatorial districts, whereas wide disparity exists in the boroughs of the City of Virginia Beach. The Court does not believe that this fact, standing alone, invalidates the plan. As the Supreme Court indicated, there may be instances or circumstances which will not comport with the dictates of the Equal Protection Clause where, designedly or otherwise, the plan operates to minimize or cancel out the voting strength of racial or political elements of the voting population. The record in the instant case makes no such suggestion. The principal and adequate reason for providing for the election of one councilman from each borough is to assure

[2]While not a part of the record in this case, it should be noted that a Democratic Primary was held in the City of Virginia Beach on April 5, 1966, under the newly devised "Seven-Four Plan." Twelve candidates ran for the eleven available seats as Democrats. Opposition existed in only one borough where the defeated candidate, having declared for election from that borough, secured more votes in the particular borough of his residence than the successful candidate. Thus it was the city-wide vote which defeated this candidate. Another interesting sidelight is that the candidate from Pungo Borough received more city-wide votes than any of the twelve men on the ballot; Pungo being the second smallest in population of the seven boroughs comprising the City of Virginia Beach.

that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. It is significant to note, however, that under the "Seven-Four Plan" the control of the City Council can always be vested in the populace of Lynnhaven and Bayside, the two largest boroughs. Assuming that the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside, if united in their efforts, could elect the four councilmen without regard to residence and, together with the two councilmen residing in their respective boroughs, would have the majority control. This would also be true if all eleven councilmen were elected at-large without regard to their place of residence.

Prior to the Supreme Court's decision in *Fortson* v. *Dorsey*, supra, a three-judge federal court in Georgia had before it the case of *Reed* v. *Mann*, 237 F. Supp. 22. The judges comprising this court were the same who decided *Dorsey* v. *Fortson*, 228 F. Supp. 259, which was later reversed *sub nom. Fortson* v. *Dorsey*. In *Reed* the statutory scheme for DeKalb County called for the county-wide election of five members of its governing body, with four of the members being required to be residents of the district which they offered to represent, the county being divided into four districts and with the proviso that no two members (excluding the chairman) could reside in the same district. The plan was attacked on the theory of deprivation of representative government because the county-wide vote may have overridden the will of those residing in the district. In rejecting this argument the court pointed out that the selection of a system, so long as it is not proscribed by the federal constitution, is not the business of the court. The

court notes that "the political unit here involved is DeKalb County, and it is plain that every voter in the county is treated equally." So also, the City of Virginia Beach is the political unit here involved and every voter in the city is treated equally. As *Reed* states, "it is to the residents of the particular unit that the one-man, one vote rule is to be applied" and "there is no right *per se* to select representatives from any given size district or unit."

The problem presented was recently considered in *O'Shields* v. *McNair*, ...F. Supp. ....., decided February 28, 1966, by a three-judge court consisting of Chief Judge Haynsworth and District Judges Martin and Hemphill. By virtue of the South Carolina Senate Reapportionment Act, some small counties were guaranteed a resident senator while other counties of more than twice the population had no such protected right. Of course, unlike the issue here presented, the senatorial candidates were not elected by the voters of the entire state and hence, when elected, became the senator from a particular county or, in multi-county districts, the voters cast their ballots on each senatorial candidate whether the candidate resided in that county or not, and such successful candidate was designated as the representative of the particular district. In discussing the related problem, Chief Judge Haynsworth had this to say:

> "We are also aware of the fact that a number of municipalities in this state elect their councils under ward-residence rules. Each electoral contest is framed by opposition between residents of the same ward, but the election is determined by the results of city-wide voting. We may assume that in some of those cities, particularly those which have been operating under that system for a long time, some wards may vary greatly in population.

> "We may also assume the general constitutionality of such municipal election schemes, but that does not dispose of the present problem. Here there is no supporting history, and the record furnishes no basis for a finding of a compelling need for resident Senators in some small counties but not in other counties of comparable size and in still others much larger."

In contrast, the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The "Seven-Four Plan" is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster. *Fortson* v. *Dorsey*, supra.

What must not be overlooked is the fact that each borough will have one or more candidates for the City Council; they are elected by all of the voters of the city to represent the entire city, not merely the borough wherein they reside.

If their election was otherwise, the "Seven-Four Plan" would be constitutionally impermissible. The four members elected at-large without regard to residence would, under normal circumstances, be from the more heavily populated boroughs. The fact that three of the eleven council members must come from the less populated boroughs does not, standing alone, amount to invidious discrimination where they are elected by the voters of the entire city.

The complaint and supplemental complaint will be dismissed. As the plaintiffs substantially prevailed in the initial phase of this litigation, and the defendants have prevailed in the later proceeding, each party will bear its own costs. Counsel for the defendants will prepare and present an appropriate decree after affording an opportunity for inspection and endorsement by counsel for the plaintiffs.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
April 8, 1966

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action 4912

J. E. Clayton Davis, et al,

Plaintiffs,

v.

Frank A. Dusch, et al,

Defendants.

Civil Action 5006

Frank V. Cogliandro, et al,

Plaintiffs,

v.

H. R. McPherson, et al,

Defendants.

MEMORANDUM

These consolidated actions involve the constitutionality of the apportionment of members of the city councils of the City of Virginia Beach (Civil Action 4912) and the

City of Chesapeake (Civil Action 5006). The charter of each city establishes the membership of the council body by defining the boundaries of the several districts or boroughs, with each district or borough being assigned a specified number of councilmen for election.

Originally these matters were heard before a three-judge court and, by agreement of counsel, it was stipulated that the evidence submitted in the three-judge court hearing could be considered by the judge to whom these cases were first presented in the event the three-judge court arrived at the conclusion that the court should be dissolved.

By order entered and filed on November 9, 1965, the three-judge court was dissolved for reasons stated in an opinion by Circuit Judge Albert V. Bryan.

The opinion of Judge Bryan clearly forecasts the inevitable result in these cases. The factual findings and legal conclusions are incorporated herein by reference. The recent decision in *Ellis* v. *Mayor and City Council of Baltimore* (4 Cir., October 11, 1965) adopts the "one person, one vote" doctrine to councilmanic representation. And "the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city"—as stated by Judge Bryan—is not denied by any of the defendants. There remains for consideration only the discretion to be exercised in determining how long the temporary systems of representation should continue, bearing in mind that each city was created, essentially to avoid annexation of portions of pre-existing counties, pursuant to charters granted by the General Assembly of Virginia at its 1962 session, the charters being effective January 1, 1963.

Since the three-judge court opinion does not specifically set forth the existing disparities constituting invidious dis-

crimination, it may be well to make these brief additional findings.

Virginia Beach

Representation on Council	*District or Borough*	*Population per District*	*Estimated Population per District (1/1/64)*
1	Blackwater	733	862
1	Pungo	2504	2806
1	Princess Anne	7211	7957
1	Kempsville	15900	22254
1	Lynnhaven	23731	37760
1	Bayside	29048	36027
5	Virginia Beach	8091	10473

The disparity of representation as revealed by the foregoing figures is too clear to require further discussion. We need not refer to the tax differential which establishes that certain districts or boroughs are effectively without representation, even though they maintain the greater portion of the tax burden.

Chesapeake

Representation on Council	*District or Borough*	*Population per District—1960*
5	South Norfolk	22,035
1	Butts Road	3,346
1	Deep Creek	11,719
1	Pleasant Grove	7,073
1	Washington	18,952
1	Western Branch	10,522

Once again the disparity of representation is obvious. Further, the charter of the City of Chesapeake provides for a tie-breaker designated by the Corporation Court to cast a vote whenever there is an equally divided vote among the members.

Taking cognizance of the fact that the General Assembly

of Virginia is scheduled to meet in Regular Session during January, 1966, the Court is of the opinion that no order should be immediately entered, other than to stay further proceedings until the commencement of the constructive session on or about March 14, 1966. By that time we will all know what, if anything, has been done by the legislative body of the Commonwealth of Virginia. The City of Virginia Beach has stated that it proposes to submit charter changes touching upon councilmanic representation. The wisdom and constitutionality of these proposed changes are not before the court at this time. If the plaintiffs are dissatisfied with such changes, and arrive at the conclusion that mal-apportionment still exists, they may file a supplemental complaint at the time of the commencement of the constructive session. The City of Chesapeake has not indicated that any charter change will be requested. Such determination is a matter for decision by its legislative representatives and the existing members of the city council. Whatever the final decision may be, this Court is not persuaded that action should be delayed until the 1968 Session of the General Assembly, or until five years following the adoption of the charter. If no constitutional action is taken by the 1966 General Assembly, there will remain the only alternative which will be to order the election of the members of the respective councils on an "at large" basis at such conveniently early date as may be determined by the Court.

The Court reserves for further determination the question of the constitutionality of the tie-breaker as provided by the charter of the City of Chesapeake. This issue may become moot if charter changes are made.

Without passing upon the argument that attorneys' fees should be taxed in favor of the plaintiffs in these actions, it cannot be said that defendants have been guilty of bad

faith in not requesting charter changes at the recent Special Session of the General Assembly convened for the purpose of apportioning the congressional districts following a decision by the Supreme Court of Appeals of Virginia. It was a matter of general knowledge that the Governor expressed a desire to limit the legislative business at that time. Moreover, the *Ellis* case was not decided until after the three-judge court hearing and the law on the subject was not as clear as it now is.

The right is reserved to renew the request for attorneys' fees in the event further proceedings become necessary, but such reservation is without any intimation that these cases are within the limited field of equity matters in which allowances have been made.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
December 7, 1965

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

J. E. Clayton Davis, et al.,

Plaintiffs,

v.

Frank A. Dusch, et al.,

Defendants.

Civil Action No. 5006

Frank V. Cogliandro, et als.,

Plaintiffs,

v.

H. R. McPherson, et als.,

Defendants.

(Argued September 21, 1965. Decided November 9, 1965.)

Before BRYAN, Circuit Judge, and HOFFMAN and BUTZNER, District Judges.

Albert V. Bryan, Circuit Judge:

Whether the principle of "one person, one vote" applies in the apportionment of members of a municipal council to the several boroughs of a city is the Constitutional ques-

tion in both of these actions. The immediate issue is whether this question requires a three-judge court to answer it.

The City of Virginia Beach in one case and the City of Chesapeake in the other, both political subdivisions of Virginia, are the municipalities in suit. Plaintiffs in each instance are citizens and qualified voters; defendants are the councilmen and other civic and electoral officials acting under the charters issued to the cities by the State. The governing body in each is a council. The charter establishes its membership. More particularly, it defines the boundaries of the boroughs, and assigns to each a specified number of councilmen for election.

This assignment is now attacked as invalid as a malapportionment violative of the Equal Protection Clause, *Davis* v. *Mann*, 377 US 678 (1964); and we are asked, because of this alleged Constitutional infirmity in the charter, to enjoin the performance of city functions under it. At the start we are met with the defendants' motion to dissolve the multiple-judge court, which was convened on the prayer of the complaints, and to allow the trial to proceed before the resident judge alone. The point made is that the controversy is of a local nature, without statewide significance, and so not within the intendment of 28 USC 2281. We agree.

The Virginia Beach charter incorporates into a single city the area of the former city of that name plus all of Princess Anne County. Chesapeake is composed of what was the City of South Norfolk with the addition of Norfolk County. Both charters were granted by special acts of the General Assembly in 1962 on the basis of agreements between the governing bodies of the consolidating areas approved by popular referenda. The apportionments of councilmen in the new cities were stated in the agreements. A proviso in each charter requires that a new plan for the

election of councilmen be submitted to the qualified voters of the city not earlier than five years after the adoption of the charter and not later than September 1, 1971.

Obviously, the apportionments made by the charters, besides being only temporary, are not of statewide interest. Their interpretation would not affect any other municipality or county in Virginia. In such unique situations the requirement of 28 USC 2281, that only a three-judge court may enjoin State officers in carrying out the directions of a State law, is not applicable. This is true here whether the defendants be considered as State or city officers. *Rorick* v. *Board of Comm'rs,* 307 US 208, 212-13 (1939); *Teeval Co.* v. *City of New York,* 88 F.Supp. 652 (SDNY 1950); see, e.g., *Bianchi* v. *Griffing,* 238 F.Supp. 997, 998 (EDNY 1965); appeal dismissed for want of jurisdiction, 34 U.S.L. Week 3117 (U.S. Oct. 12, 1965); *McMillan* v. *Wagner,* 239 F.Supp. 32, 33 (SDNY 1964).

Furthermore, we think that a three-judge court is also inappropriate because this litigation no longer presents a Constitutional question which is beyond the jurisdiction of a sole District Judge. The statute does not require three judges where the decision will be governed by the application of Constitutional principles already authoritatively established. *James & Co.* v. *Morgenthau,* 307 US 171, 172; *Harvey* v. *Early,* 160 F2d 836, 838 (4 Cir. 1947). That the "one person, one vote" precept embraces councilmanic representation is now settled in this Circuit. *Ellis* v. *Mayor and City Council of Baltimore* (4 Cir. October 11, 1965); see also *Bianchi* v. *Griffing,* supra, 238 F.Supp. 997 (EDNY 1965) and authorities cited therein. Moreover, the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city is not denied by the defendants. What may now and subsequently have to be decided in these cases

are matters well within the province and for the judgment of a one-judge court.

An order will be passed dissolving the three-judge court, and remanding the complaints to the judge of this court at Norfolk (to whom they were first presented) for direction of such remedies as he deems necessary or proper.